

**OPINION  
79-26**

March 6, 1979            (OPINION)

Honorable L. E. Berger  
House of Representatives  
State Capitol  
Bismarck, North Dakota 58505

Dear Representative Berger:

This is in response to your letter of January 18, 1979, wherein you make the following inquiry:

Recently I conferred with John D. Kelly, attorney for Cass County Electric Cooperative, Inc., of Kindred, North Dakota. Cass Electric is a cooperative corporation organized under the laws of North Dakota and provides electric service to its members in the rural areas of southeastern North Dakota, including portions of the 13th Legislative District. Historically, the Rural Electrification Administration of the United States Department of Agriculture has been the source of construction funds for Cass Electric. Loans from the Rural Electrification Administration are secured by appropriate notes and mortgages duly executed by the Cooperative. Recently the Rural Electrification Administration advised Cass Electric that it would be necessary for the Cooperative to increase its debt ceiling in order to secure future loan funds. Mr. Kelly has determined that there is nothing in the articles of incorporation or the bylaws of Cass Electric relating to the question of a corporate debt ceiling.

Subsequently, it was ascertained that the Rural Electrification Administration was operating under the impression that North Dakota law requires that corporations set debt ceilings that can only be increased or adjusted by a majority of the members or shareholders. Mr. Kelly's review of the North Dakota Century Code and Constitution failed to disclose any provision mandating such a requirement.

Accordingly, on November 3, 1978, he wrote to Mr. W. W. Woodson, Chief, Operations Branch, Northcentral Area Office, Rural Electrification Administration giving his opinion with respect to the requirements of North Dakota law. A copy of his letter is attached for your information. Thereafter on November 6, 1978, the directors of Cass Electric canceled, terminated and annulled any debt ceiling, limitation or restriction that might have been adopted in the past, either by the board or by the members of the cooperative. Mr. Woodson and the Rural Electrification Administration were notified of this action by a letter of November 17, 1978 sent by Willard Grager, Cass Electric's manager.

On November 28, 1978 Mr. Woodson responded to Mr. Grager again raising a question concerning the requirements of North Dakota law. A copy of this letter is also attached.

You will note that Mr. Woodson for the Rural Electrification Administration, suggests either an opinion from your office or appropriate remedial legislation. I, of course, would be prepared to sponsor corrective legislation if in fact there was some current state law that had created this situation. However, I do not perceive the problem as one created either by the current constitution or laws of the State of North Dakota and I therefore do not believe that the Legislative Assembly is equipped to deal with this matter.

It is clear from Mr. Woodson's letter that the Rural Electrification Administration is prepared to accept the opinion of the Attorney General of North Dakota on what is viewed by them as a doubtful question of state law. This is a matter of statewide significance. There are a large number of cooperative corporations providing basic utility services to thousands of North Dakotans. As you know there are in excess of 20 electric cooperatives operating under North Dakota law in addition to many rural telephone cooperatives who all face this common problem. Consequently, I earnestly request your opinion with respect to whether or not there are any statutory or constitutional requirements under North Dakota law with respect to debt ceilings or limitations by cooperative corporations.

Subsection 4 of Section 10-15-03 of the North Dakota Century Code provides in part:

Unless otherwise provided by its articles, a cooperative may:

\* \* \*

4. Make contracts, incur liabilities, and borrow money; issue certificates representing indebtedness. ..

Subsection 4 of Section 10-13-03 provides in part:

10-13-03. POWERS OF ELECTRIC COOPERATIVES. In addition to the powers granted by the general law governing cooperatives, electric cooperatives have the power:

\* \* \*

4. . . . to receive, acquire, endorse, pledge, hypothecate, and dispose of notes, bonds, and other evidences of indebtedness.

Section 138 of the North Dakota Constitution provides:

Section 138. No corporation shall issue stock or bonds except for money, labor done, or money or property actually received; and all fictitious increase of stock or indebtedness shall be void. The stock and indebtedness of corporations shall not be increased except in pursuance of general law, nor without the consent of the persons holding the larger amount in value of the stock first obtained.

Section 138 was proposed for repeal by Chapter 604, S.L. 1977, submitted to the voters at the primary election held on September 5, 1978, and the proposed repeal was defeated.

On July 30, 1965, this office opinioned (copy enclosed) that Section 138 applies to a cooperative association for the purposes of increasing its capital stock. Section 144 of the Constitution, found in the same article (VII) as Section 138, which is quoted and discussed in our 1965 opinion, was also proposed for repeal to the voters in the 1978 primary election and the proposed repeal measure was defeated.

Although our 1965 opinion was limited to the issue of the application of Section 138 to a proposed increase in the capital stock of a cooperative, it is considered that the same reasoning applies to a proposed increase in the indebtedness of a cooperative whose articles of association set forth that it is organized with capital stock pursuant to subsection 4 of Section 10-15-05.

Where a cooperative's articles of association provide for organization without capital stock it would appear that compliance with Section 138 for purposes of a proposed increase in indebtedness could be achieved by "pursuance of general law." For purposes of a cooperative association organized without capital stock we find neither a constitutional nor statutory limitation upon the amount of debt allowed to be incurred by the association. Whether the actions of the membership, directors or officers of a noncapital stock cooperative are to be governed by limitations on the amount of indebtedness to be incurred would appear to be within the power of the membership through provision or amendment of its articles of association and/or bylaws.

For a cooperative association organized with capital stock it is considered that a proposed increase in indebtedness would require compliance with the "pursuance of general law" and the "consent" provisions of Section 138.

We are not informed of the provisions of the articles of association of the Cass County Electric Cooperative concerning stock or nonstock organization under subsection 4 of Section 10-15-05. Therefore, we have included herein a discussion of the extent of the applicability of Section 138 for both stock and nonstock organization.

The suggested "corrective legislation" referred to in your letter would apparently be directed at stock organized associations. We note that since the "consent" requirements of Section 138 applicable to increased indebtedness of stock associations are constitutional and that Chapters 10-13 and 10-05 are silent as to the "consent" of stockholders, any "corrective legislation" may necessarily be required to be in the form of proposed constitutional amendment or repeal. Had the voters in the 1978 primary election approved the proposed repeal of Section 138 the "consent" requirements to be obtained from the shareholders of stock organized cooperative associations would have no longer been mandatory unless provided for by the membership in articles of association and/or bylaws of the cooperative.

Assuming that the Cass County Electric Cooperative is a nonstock organized association and that its articles of association and bylaws are silent "with respect to establishing or changing any debt ceiling, restriction or limitation," we would agree with your conclusion that the increased indebtedness problems of the cooperative associated with the securing of future federal loan funds from the Rural Electrification Administration are not a result of constitutional or statutory provisions of state law referred to above and herein discussed. Rather these problems appear to have resulted from interpretations given state law by federal agency officials.

It is hoped that the foregoing will be of assistance.

Sincerely,

ALLEN I. OLSON

Attorney General